APPEAL NO. 93323

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was originally held in (city), Texas, concluding on October 19, 1992. This panel reversed the decision of hearing officer and remanded the case to allow the designated doctor to certify maximum medical improvement (MMI) and to state whether he had used the statutorily-prescribed version of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). Upon adducing such information in the form of letters from the designated doctor, the hearing officer determined that the designated doctor certified MMI on the date he examined the claimant; that he used the statutorily-prescribed version of the AMA Guides; and that the claimant reached MMI on August 24, 1992, with a 29% whole body impairment rating.

The appellant, hereinafter carrier, raises numerous points of error on appeal, summarized as follows: the hearing officer erred in rendering a decision on remand without opportunity for a hearing and in considering "secret" evidence without allowing the parties an opportunity to rebut such evidence; the hearing officer erred in determining that claimant reached MMI on August 24, 1992, since this was not an issue on remand and neither the Appeals Panel nor the hearing officer had further jurisdiction over this issue; the hearing officer also erred in making a determination of MMI because the designated doctor failed to apply the statutory definition of MMI, to complete the Form TWCC-69 and to comply with rules of the Texas Workers' Compensation Commission (Commission); the hearing officer erred in finding a 29% impairment rating as this was based upon an incomplete Form TWCC-69 and "secret" evidence, and was contrary to the great weight of the other medical evidence; and the hearing officer erred in denying the carrier the right to introduce medical records documenting prior injuries, conditions, and impairment. The respondent, hereinafter claimant, filed no response.

DECISION

Finding that the hearing officer erred in making a determination that was based in part on new evidence as to which the parties had no notice or opportunity to comment, we reverse the Decision and Order of the hearing officer and render a new decision.

The facts of this case, which are set out in the first decision by this panel, *see* Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993, will not be repeated at length herein. Basically, the claimant saw three doctors who certified MMI and assigned an impairment rating, before he was referred to the Commission-appointed designated doctor, (Dr. P). In a Report of Medical Evaluation (Form TWCC-69) dated September 25, 1992, Dr. P assessed a 29% whole body impairment rating but did not certify a date of MMI. At the hearing and on appeal the carrier objected to Dr. P's report on many grounds, including the fact that, carrier contended, Dr. P did not use the version of the AMA Guides prescribed by the 1989 Act, Article 8308-4.24. This panel remanded to allow further evidence to be adduced concerning whether Dr. P used the proper version of the AMA

Guides, and also because the designated doctor's report, which did not contain a date of MMI, was not complete.

On March 9, 1993, the hearing officer sent a letter to Dr. P, copy to both parties, asking him to answer the two questions at issue. On March 12th, Dr. P replied in pertinent part as follows: "In my opinion, I first examined [claimant] on August 24, 1992, and thats (sic) when I felt he has reached [MMI]."

On March 16th, the hearing officer once again wrote Dr. P, copy to the parties. As she wrote, "Section 4.24 of the Texas Workers' Compensation Act requires that the second printing, dated February, 1989, of the Guides to Evaluation of Permanent Impairment, third edition, be used in assessing impairment ratings. Could you please confirm for me that this is the edition of the Guides you used; and, if you used the revised third edition, could you please pull out the older edition required by the law, determine if any changes in the impairment rating would be necessary, and either confirm the 29% previously assigned or assign a new impairment rating." On March 17th, Dr. P replied as follows: "I would like to mention that I did use 1989 Guides to Evaluation of Permanent Impairment, third edition in the case of [claimant]. My opinion still stands the same. He retains a 29% impairment rating."

Based on the above information, and without convening a hearing or otherwise notifying the parties, the hearing officer determined that Dr. P had used the correct version of the AMA Guides and had found MMI on August 24, 1992.

The carrier's first appeal point is that the hearing officer erroneously rendered her decision on remand without a hearing and by considering evidence, in the form of Dr. P's letters, which carrier neither saw nor had the opportunity to rebut. We note that neither the record nor the hearing officer's decision reflect that either party was provided with Dr. P's letters prior to the issuance of the Decision and Order. The failure to provide the parties with such new evidence, along with any opportunity to comment on or rebut such evidence, constitutes reversible error. Similarly, we do not review such evidence.

It has been held that the right to examine and rebut evidence is not confined to court trials but applies also to administrative hearings. Richardson v. Pasadena, 513 S.W.2d 1 (Tex. 1974). Courts also have articulated the requirement that a "full and fair hearing on all disputed fact issues" be accorded administrative litigants, Texas Employment Commission v. Johnnie Dodd, 551 S.W.2d 171 (Civ. App.-Waco 1977, writ ref'd n.r.e.), and have held that the basic notion of a fair hearing requires that a party "be apprised of the evidence contrary to his position so that he may refute, test, and explain that evidence," Railroad Commission v. Lone Star Gas, 611 S.W.2d 911 (Civ. App.-Austin 1981, writ ref'd n.r.e.). We note that the 1989 Act contains similar safeguards, for example, that the hearing officer ensure the preservation of the rights of the parties and the full development of facts required

for the determinations to be made, Article 8308-6.34, and the requirement that documentary evidence be timely exchanged between the parties prior to hearing, Article 8308-6.33(d)(1). We are not holding, however, that such notion of a full and fair hearing necessarily requires the hearing officer on remand to convene a formal hearing requiring personal attendance by the parties; rather, alternative, less formal means could be employed. The parties may also affirmatively waive hearing on remand.

The Appeals Panel has previously reversed and remanded to the hearing officer a case in which there was no indication the parties had received a designated doctor's report or were permitted to respond to it, despite the fact that the hearing officer's decision was based on the report. Texas Workers' Compensation Commission Appeal No. 93001, decided February 19, 1993. However, the instant case has previously been before this panel, and Article 8308-6.42(b) provides that the Appeals Panel may reverse a decision and remand no more than one time to the hearing officer for further consideration and development of evidence. Despite our finding of reversible error in this case, the statute limits us at this point from taking any action other than reversing and rendering a new decision. Article 8308-6.42(b). Based upon the record before us, and not considering the new evidence that was not provided to the parties (which includes information from the designated doctor which is vital to the completeness of his report), we must render a decision that a proper and sufficient determination of MMI and an impairment rating has not been made.

We are mindful that this decision will require the parties to take further steps to resolve the issues in dispute, and we are sensitive to the need, in all fairness, to minimize the inconvenience to either party. It appears that this situation may be one which fits within the Commission's guidelines for proceeding directly to a contested case hearing, pursuant to Article 8308-6.12(c) and Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.5(b) ("Parties may proceed directly to a contested case hearing without attending a benefit review conference if the commission determines that. . . the situation of the parties or the nature of the facts or law of the case is such that the overall policy of the Act would be advanced by proceeding directly to a contested case hearing.")

Because of our ruling on the carrier's first point of error, we do not address the carrier's remaining points.

For the foregoing reasons, the decision of the hearing officer is reversed and a new decision is rendered that a proper and sufficient determination of MMI and impairment rating has not been made at this time. The parties may hereafter take all necessary steps to expeditiously resolve this dispute.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge